

**Cleveland Construction, Inc. and United Brotherhood of Carpenters and Joiners of America, Local 1207, AFL-CIO.** Case 9-CA-34591

June 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On November 21, 1997, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order as modified.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Cleveland Construction, Inc., Charleston, West Virginia, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2 (e).

“(e) Within 14 days after service by the Region, post at its facility in Charleston, West Virginia, copies of the attached notice marked “Appendix.”<sup>8</sup> Copies of the notice, on forms provided by the Regional Director

<sup>1</sup> No exceptions have been filed regarding the various 8(a)(3) and (1) allegations dismissed by the judge.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. Although the judge did not make specific credibility findings, he did make implicit credibility findings by relying on the testimony of employee Raymond DeNuzzo in his factual findings, and on that basis concluding that employees DeNuzzo, Dewey Bruce Murphy, and Michael George had gone to the job superintendent to ask about their jobs, that DeNuzzo made a specific offer to return, and that the superintendent responded that the employees were terminated. It is the Board's established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that, even if the employees did not make an unconditional offer to return to work, the Respondent violated Sec. 8(a)(3) by terminating them for having struck. The complaint alleged such a termination, and the judge reached that conclusion.

<sup>3</sup> In accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), we have modified the Order to require that, in the event the Respondent goes out of business or closes its facility during the pendency of these proceedings, the Respondent shall mail a copy of the notice to all employees employed by it as of February 7, 1997, the date the unfair labor practice occurred, rather than the date the strike began.

for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 1997.”

*James E. Horner, Esq.*, for the General Counsel.

*Brian D. Yost, Esq. (Holroyd & Yost)*, of Charleston, West Virginia, for the Respondent.

*Shirley Skaggs, Esq. (Cardwell and McCormick)*, of Charleston, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. This case is about a brief 2-week work stint in January 1997 by several carpenters on a nonunion hotel construction project in Charleston, West Virginia. Local 1207 of the United Brotherhood of Carpenters and Joiners of America (the Union) recruited four unemployed and/or underemployed men—Dewey Bruce Murphy, Raymond DeNuzzo, Michael George, and Jason Canterbury—to obtain jobs at the hotel site and simultaneously organize the employees there. Shortly after starting their jobs, these men revealed their union status to management and a succession of adverse things then happened, culminating in their termination. Thus, the issue is whether their descent and exit from the job violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Union filed charges against the Employer, Cleveland Construction, Inc., immediately after the termination of the men. Shortly thereafter, on March 24, 1997, the General Counsel issued its complaint, which was answered by the Respondent on April 17, 1997. A hearing was then held in Charleston, on July 22–23, 1997, at which the General Counsel presented three of the four discharged employees as witnesses. The Respondent then presented two of the jobsite supervisors as witnesses. Finally, briefs were filed by the General Counsel on August 26, 1997, and Respondent on September 3, 1997.<sup>1</sup>

FINDINGS OF FACT

Respondent is a contractor in the building and construction industry and in 1996 it started work on a new Embassy Suites Hotel in downtown Charleston, West Virginia. At this construction site, Respondent purchased and received over

<sup>1</sup> Respondent's motion for an extension of time, until September 3, 1997, to file its brief was granted. The Union did not file a brief but requested permission to file a reply brief. That request was denied on September 30, 1997.

\$50,000 in goods from outside of West Virginia (G.C. Exh. 1(i)). “Sal” was the job superintendent in mid-January 1997 and he had a regular crew of about 10 carpenters working on the project who rotated from one Cleveland construction site to another (Tr. 223–224). As the project progressed, a local unemployed carpenter, Raymond DeNuzzo, learned of additional openings for carpenters. DeNuzzo had been a union member since 1985 in New York (Tr. 178) and joined Local 1207 in Charleston in 1996. DeNuzzo visited the jobsite and spoke with Sal, who hired him on the spot. Sal then asked DeNuzzo if he had a crew and extra equipment for the crew because Cleveland was short on equipment. Because the job was nonunion, DeNuzzo was concerned about working there without first talking with Local 1207. To that end, DeNuzzo spoke with the Union’s business agent, Robert Sutphin, who said that it was okay to take the job. Sutphin added that he would provide DeNuzzo with some extra men to work there too (Tr. 132–137).

Shortly before the first day on the job, Union Official Billy Thomas visited DeNuzzo’s home with Dewey Bruce Murphy, who was to be a member of DeNuzzo’s crew. Murphy was a journeyman carpenter who had been with the Union a little over 1 year. Thomas then asked DeNuzzo whether he would organize the job for the Union, and Thomas explained how this would happen. DeNuzzo had never organized a jobsite before and was somewhat reluctant. But he needed the job and agreed. DeNuzzo would have the power to decide when to disclose their organizing effort to the Cleveland supervisors and would have to meet with union officials after work to discuss how the organizing campaign was going (Tr. 13, 137–139).

January 20, 1997, was the starting day for work. DeNuzzo met Murphy at the jobsite that morning, and they were joined by two nonunion people: Michael George, an apprentice carpenter, and Jason Canterbury. The four men talked about how they would watch out for each other on the job (Tr. 99, 140–141). DeNuzzo then walked over to Sal and presented the other three. Sal hired them immediately but told them that they would have to supply their own hardhats. Because none of them brought any the group drove off to get some and returned at 10 a.m. (Tr. 14–15, 101, 141). The hotel’s construction was still in its initial stages and all four men worked through the end of the week without incident (Tr. 143–144). Fridays were a half day at work and after quitting time Thomas met with Murphy to give him a letter from Local 1207 addressed to Cleveland Construction, stating that the four men were going to attempt the organization of the jobsite (G.C. Exh. 2; Tr. 18).

Before the start of the workweek of January 27, Sal was replaced as job superintendent by another veteran Cleveland Construction employee, Jack Brooks (Tr. 264). This was Brooks’ first such position, as he previously held the lesser title of foreman (Tr. 291, 299–300). According to DeNuzzo, the four decided to present the letter to management sometime soon because the atmosphere on the job was “tense.” DeNuzzo felt that Sal had been rude by saying that he was not working fast enough. Also, other unnamed people criticized his carpentry skills. He also felt that Brooks was rude to him (Tr. 170–171). So, on Tuesday, January 28, all four men signed the union letter and presented it to Brooks during the first morning break. Brooks became red-faced and said he “bet” the men would not be successful in organizing the

job for the Union (Tr. 19–20, 102–103, 144–145, 266). The rest of Tuesday was uneventful (Tr. 60). Murphy did some organizing work for the Union at lunch and after work (Tr. 59). Also, after work the four men talked amongst themselves about the job in general (Tr. 90–91). But the men did not have any specific plans about what to do the next day (Tr. 118–119).

On Wednesday, January 29, there was a morning meeting of all employees, called by Brooks, at the gangbox, which is where the workers stored their tools. Brooks stated that the entire worksite was too messy and that lunch, if eaten on the site, would have to be eaten in one specific area from now on. Next, he announced that the workers would have to wear new hardhats with a Cleveland Construction logo. Finally, according to Murphy and DeNuzzo, Brooks stated that bathroom breaks were now only allowed during regularly scheduled breaks or lunch (Tr. 21–22, 148). George also testified that Brooks told the men to use the bathroom only “on our own time” (Tr. 117–118). Brooks, however, denied issuing any edict about bathroom breaks (Tr. 269). In this connection, Murphy testified that the bathroom policy was not enforced against the Cleveland Construction main crew (Tr. 22–23).

Later that same day, while using a chop saw to cut metal, Murphy asked Brooks about getting some safety glasses and a dust mask (Tr. 24). According to company policy, everyone on the jobsite is required to wear safety glasses (Tr. 203, 226, 271). And according to Murphy, the chop saw safety manual also recommends use of a dust mask (Tr. 43). About 15 minutes later, Brooks approached Murphy and threw down a pair of safety glasses but said that there were no dust masks (Tr. 24–25). Later, Brooks said, “Here come the troublemakers” when Murphy and DeNuzzo walked by, a refrain echoed by other workers. Brooks then criticized their carpentry skills (Tr. 29–30, 104–105, 146–147).

Still later in the day, Brooks assigned all four men to work together installing metal track using a “Hilti” gun. The four men had not previously been assigned to work together. Indeed, Murphy never saw a four-man unit on the jobsite before or after (Tr. 23–24, 63, 106). But there was sufficient work for all four men to perform (Tr. 123). The manufacturer of a gun similar to the Hilti recommends eye and hearing protection (G.C. Exh. 5). Murphy is licensed to use the gun but DeNuzzo’s license had expired (Tr. 27, 178). The Hilti gun was loud but did not bother George (Tr. 107–108). However, the noise bothered Murphy and DeNuzzo because the area in which they used it that day was a “little more confined” (Tr. 50). So, DeNuzzo asked Murphy to go to Brooks and get some hearing protection. Brooks asked Murphy why this was a problem now because he had used the gun the day before without any complaint. Then, according to Murphy, Brooks said that Murphy could go home if he did not want to use the gun without hearing protection (Tr. 25, 29–30, 68–70, 108, 151–52). Brooks testified, however, that he told Murphy that hearing protection and dust masks should be in the gangbox. But Brooks did not recall if he told Murphy to go home (Tr. 269–271). Neither Murphy nor DeNuzzo ever saw any hearing protection or dust masks in the gangboxes (Tr. 94, 165–166). And George never saw anyone wearing safety glasses, dust masks, or hearing protection on the job (Tr. 127). Murphy then relayed Brooks’ message to DeNuzzo and George, whereupon all three men left

the jobsite to file a complaint with the local office of the Occupational Safety and Health Administration (OSHA). On the way out, they told Brooks they were not quitting and Brooks stated that they should return the next day (Tr. 33–34, 109, 153). Roy Atherton, Cleveland Construction's general superintendent, visited the Charleston project that last week of January and saw the union letter presented by the four men to Brooks (Tr. 199, 227). As far as he knew, hearing protection was available on the jobsite and Brooks told him this (Tr. 237, 258).

On Thursday, January 30, Brooks assigned several carpenters, including Murphy, DeNuzzo, and George, to carry sheets of drywall, which weigh 60–70 pounds each. This is work typically performed by unskilled laborers. Brooks told them that they would not need their tools for this type of work. So, Murphy, DeNuzzo and George hid their tools away in a nearby culvert. This drywall work lasted most of the morning (Tr. 35–36, 73, 95, 110, 125, 154–156, 181, 311–315). Before lunch, Murphy moved his tools from the culvert to his truck where he ate lunch (Tr. 313). After lunch, Atherton spotted Murphy coming back 8 minutes' late and without any safety glasses. Murphy told Atherton that the glasses were in his truck, along with his tools, for safekeeping. According to Atherton, Murphy had to return to his truck, which was off the jobsite, several times to retrieve different items. At that point, Atherton told Murphy to go home for the day (Tr. 37–38, 203–206, 242–243). As he was leaving, Murphy testified that Atherton and Brooks followed him out to his truck and stood in front of it blocking his departure for a few moments. Murphy added that Atherton said, "[W]e will be waiting on you." (Tr. 52–54.) Atherton testified that he did accompany Murphy to his truck, but only to make sure there was no trouble, following Murphy's statement that he was worried about his truck. Murphy and DeNuzzo had in fact seen screws lying around Murphy's, DeNuzzo's, and Canterbury's trucks earlier (Tr. 312, 316). Atherton denied saying anything to Murphy in the parking lot (Tr. 254). Brooks backed up Atherton's version of this event (Tr. 274).

The next day, written warnings were issued to Murphy for being late, not having safety glasses immediately available, and not having tools on site to perform required work (G.C. Exhs. 3–4). According to Atherton, these warnings were warranted notwithstanding the fact that Murphy did not need his tools to carry drywall. Rather, the Company's policy is that each employee must have his tools "on the job site" because the employee is expected to perform a variety of jobs during the work day, some requiring tools (Tr. 229, 245). But for the first half of 1997, this was the only such Cleveland Construction employee disciplined at the Charleston jobsite (Tr. 238, 288).

Friday, January 31, would turn out to be the final day on the job for the four men. That morning, Orvie Nicholson, an OSHA inspector, visited the jobsite pursuant to the complaint filed 2 days' earlier. Nicholson talked with George, who falsely said that dust masks were provided by management. But he said this only because Brooks and Atherton were standing next to him and he wanted to keep his job (Tr. 112). Then Nicholson talked with Murphy, who explained that the chop saw caused dust and noise problems for him. Another Cleveland Construction employee, Orie Stephens, interrupted Murphy's conversation with Nicholson, telling

Nicholson that Murphy did not use the chop saw to cut the metal that Murphy was apparently referring to. At this point, Atherton and several other employees gathered around. Atherton asked Murphy if he was lying to Nicholson. Atherton then told Murphy to get back to work and install "a header." However, Murphy already saw a header installed at the location that Atherton pointed to. But Atherton repeated his order. Murphy then asked Nicholson for a business card, realizing that his conversation with Nicholson was over for now. A few moments later, a metal stud struck Murphy on his hardhat and stunned him (Tr. 40–46, 160, 213–14). According to Atherton, it was common for metal studs to pop loose on the jobsite (Tr. 215). DeNuzzo saw what was happening and then decided that the situation was now too uncomfortable to continue working. So, he, Murphy, and George left to go "on strike" and they told this to Brooks and Atherton. The other employees laughed upon hearing this (Tr. 46, 114, 160, 213). Canterbury, however, did not join the other three (Tr. 86). Earlier, Canterbury approached Brooks and Atherton, stating that he feared the loss of his job because of his name on the union letter. But Brooks assured him that he was welcome to continue working (Tr. 254–56, 273–274). After 11:30 a.m., as regularly scheduled on Fridays, DeNuzzo, Murphy, and George went to Brooks to receive their paychecks (Tr. 161–162).

The record is silent as to what happened on Monday, February 3. But on Tuesday, February 4, DeNuzzo, Murphy, and George returned to the jobsite to picket (Tr. 46, 115–116). Canterbury joined the picket line later that week, which was comprised of at least 20 people<sup>2</sup> (Tr. 87–89). After a few days of picketing, DeNuzzo was told by a union official to return to work (Tr. 188). Therefore, on Friday, February 7, DeNuzzo, Murphy, and George went to Brooks to ask about their jobs. DeNuzzo testified that he told Brooks that "I was here to go back to work." Brooks replied, however, that the men had quit. DeNuzzo disagreed, saying that they did not quit but had merely gone out on strike. DeNuzzo then asked Brooks if they were terminated, to which Brooks replied, "[Y]es, you are terminated." Brooks added that the men "could get our checks but we couldn't go back to work." (Tr. 116–117, 164.) According to Brooks however, when asked by the men if they still had jobs he replied, "[Y]ou guys, you know, you walked off. That's all I said." (Tr. 277.)

As it turned out, OSHA never issued any citation to Cleveland Construction after the January 31 inspection (Tr. 217–219). Rather, the OSHA people suggested to Murphy that he go to the National Labor Relations Board (Tr. 84). After four separate charges were filed, on January 31, February 3, 5, and 13, 1997, someone from the Regional Office suggested that Murphy return to the jobsite to inquire again about work. Murphy complied in late March or early April, but Atherton and Brooks told him that they were not hiring (Tr. 91–92, 97). And as of the summer of 1997, the hotel construction was 75-percent complete (Tr. 261). Brooks left the job for 1 month, in June 1997, because of "too much pressure." But he returned in July (Tr. 289–292).

<sup>2</sup> The record is unclear as to whether the picketers were comprised of other Cleveland employees, or just other union members.

## Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by embarking upon a plan to get rid of Dewey Bruce Murphy, Raymond DeNuzzo, and Michael George<sup>3</sup> immediately after these employees presented their job superintendent, Jack Brooks, with a letter revealing their union status on January 28, 1997. Respondent, however, contends that the Murphy-DeNuzzo-George work stint was a bad-faith salting campaign designed “to disrupt the Respondent’s construction project rather than organizing its work force as no such organizing efforts were ever attempted.” Upon a thorough review of the record evidence, the presiding Judge concludes that neither characterization of this brief work stint is correct. Nevertheless, as explained below, this case can be easily resolved beginning with the events of January 31, which is when the men began their strike.

At the outset, however, the presiding Judge rejects the General Counsel’s theory that Respondent hounded the men out of their jobs. In this regard, the allegedly harsh working conditions imposed by Respondent after the presentation of the union letter on January 28 were neither discriminatorily imposed solely on the four men, nor all that harsh to begin with. Turning first to the events of January 29, Brooks’ bathroom policy was announced at a meeting of all employees, never enforced, and arguably rescinded by Brooks and his superior, Roy Atherton, in Atherton’s later conversation with Michael George (Tr. 118). Next, the allegation that Respondent isolated the four men, presumably to hinder their organizing ability, is rejected. Simply put, aside from one January 29 episode, during which there was sufficient work for the four men to perform as a unit, there is no other evidence of any other segregation. Indeed, the General Counsel’s only citation in its brief of isolation is misplaced: the carrying of drywall on January 30 by nonunion employees in addition to the four men. Thus, the General Counsel has failed to establish any discriminatory isolation of the four men during their stint at Cleveland Construction. Compare *Munno Electric*, 321 NLRB 278 (1996) (clustering of union activists at a different jobsite violates Section 8(a)(3)). Next, while it is uncontested that Brooks said, “[H]ere come the trouble-makers” to Murphy and DeNuzzo, this single utterance, standing alone, does not give rise to an inference of union animus by Respondent. See *Guarantee Savings & Loan*, 274 NLRB 676, 679–680 (1985).

Moving on to the allegedly onerous carrying of heavy drywall sheets on January 30, it is highly significant that Brooks assigned two other nonunion employees, as discussed above, to perform this task along with Murphy, George, and DeNuzzo. Also, it is un rebutted that this work needed to be done and that it lasted for only a few hours. Thus, the General Counsel has failed to establish, by a preponderance of the evidence, that the drywall carrying was a reprisal for the union letter. Next, it is concluded that Atherton’s reprimand and half-day suspension of Murphy was warranted. The evidence is clear that he was late after lunch, albeit by only 8 minutes, and did not have his tools with him as required by

company policy, albeit they were nearby and not needed earlier in the day to carry the drywall. As for the General Counsel’s contention that another employee in the vicinity was not also disciplined, the record about this other person is simply unclear. Thus, notwithstanding the fact that Murphy was the only employee disciplined in the first 6 months of 1997, it cannot be concluded that Respondent acted unreasonably or in a discriminatory fashion against Murphy. Finally, the evidence is murky regarding any physical threat to Murphy and/or the four men’s trucks. Although the record reveals that there were screws lying around their trucks, it cannot be said how the screws got there or whether this was an unusual occurrence for a parking lot adjacent to a construction site. And, as for Atherton and Brooks’ accompaniment of Murphy to his truck, it is simply unclear whether this constituted a genuine instance of intimidation or Atherton’s desire to make sure that there was no danger to Murphy’s truck, following Murphy’s statement that he was concerned about such a possibility. Accordingly, the General Counsel has failed to prove a violation of Section 8(a)(3) of the Act.

As noted above, however, the direction of this case changes with the events of January 31. To summarize that day, the OSHA inspector visited the jobsite and talked with Murphy, who had left work early on January 29 along with DeNuzzo and George to file a complaint with OSHA following Brooks’ failure to provide the men with breathing and hearing protection in connection with their use of the chop saw and Hilti gun, respectively. In the middle of Murphy’s conversation with the inspector, a coworker accused Murphy of lying, Atherton intervened and ordered Murphy back to work, and a metal stud hit Murphy on the hardhat. At that point, Murphy, DeNuzzo, and George announced they were going on strike. After a few days of picketing, the three men offered to return to work, whereupon Brooks told them they were terminated.<sup>4</sup>

It is well-settled that employees have “the right to act together to better their working conditions,” especially where employees are unorganized and have no representative to present their grievances to an employer. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). First, it is concluded that the strike of Murphy, DeNuzzo, and George was concerted and clearly related to Respondent’s failure to provide them with adequate safety protection. Indeed, they had left work 2 days’ earlier to file a complaint with OSHA, and it was the interruption of Murphy’s conversation with the OSHA inspector that triggered the January 31 work stoppage. As for Respondent’s contention that Murphy somehow lied to the OSHA inspector that day, thus undermining the protected nature of the walkout, a correct reading of the record reveals that one of Murphy’s coworkers simply accused him of lying, not that Murphy actually lied. In any event, there is no evidence to corroborate the coworker’s accusation.<sup>5</sup> Respondent likewise misreads the record in contending that the three men had decided earlier in the day to walk off the job,

<sup>4</sup> Thus, Brooks’ denial that he told the men they were terminated is rejected as inconsistent with the overwhelming weight of the record evidence.

<sup>5</sup> Respondent also throws in a red herring regarding George’s lying to the OSHA inspector. Although it is true that George falsely said that he was using a dust mask, he did this because Atherton and Brooks were listening, and George did not want to jeopardize his job.

<sup>3</sup> Jason Canterbury, of course, was the fourth man to sign the union letter presented to Brooks. But the General Counsel’s complaint does not allege anything about Canterbury. And as noted supra, Canterbury did not testify.

and that this somehow also undermines the protected nature of their decision to strike. Rather, there is simply no evidence to support Respondent's theory (Tr. 119–121). Second, because the reasonableness of the workers' decision to go on strike is irrelevant, OSHA's subsequent failure to issue a citation against Respondent is likewise irrelevant in determining whether the walkout is protected Section 7 activity. 370 U.S. at 16. However, it should be noted the record is unclear as to why no OSHA complaint was ever issued.<sup>6</sup> Further, the evidence is clear that two safety manuals do recommend use of breathing and hearing protection for the tools in question. Third, it is immaterial that Respondent provided no such safety protection to any employees on this jobsite, as the preponderance of the record evidence reveals. Rather, the plain fact is that Murphy, DeNuzzo, and George believed such protection was needed and they decided to exercise their Section 7 rights to obtain such protection. Finally, it is likewise immaterial that the General Counsel failed to establish exactly what Murphy, DeNuzzo, and George were seeking from Respondent beginning on January 31. In this connection, their strike was still protected Section 7 activity notwithstanding their apparent failure to "present a specific demand upon their employer to remedy a condition they find objectionable." 370 U.S. at 14.

After the apparent conclusion of the strike on February 7, it is concluded that Murphy, DeNuzzo, and George made an unconditional offer to return to work when they approached Brooks to ask him about their jobs. Respondent cites *Gaywood Mfg. Co.*, 299 NLRB 697 (1990), in support of its contention that Murphy, DeNuzzo, and Brooks merely made an "inquiry as to the status of their jobs." However, in *Gaywood*, the returning strikers said, "they would think about returning to work." 299 NLRB at 701. Here, there were no strings attached by the three men. Rather, their inquiry was unequivocal and their offer to return was unconditional. Moreover, Respondent never hired workers to replace any of these three men. Finally, Respondent is incorrect that the three men engaged in a strategy of unprotected "hit and run" strikes, by virtue of their early departure of January 29 and strike of January 31–February 6. Indeed, Brooks allowed the men to leave early on January 29. Suffice it to say that one work stoppage does not constitute "a pattern of intermittent action which is inconsistent with a genuine strike." *Polytech, Inc.*, 195 NLRB 695, 696 (1972).

In summary, Respondent did not engage in a carefully premeditated campaign to rid itself of the men who signed the union organizing letter. However, Respondent stepped over the line by terminating Murphy, DeNuzzo, and George, who had merely engaged in a lawful strike to protest the safety conditions at Respondent's jobsite. Therefore, Respondent violated Section 8(a)(1) of the Act, which "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978).

Accordingly, Murphy, DeNuzzo, and George are entitled to reinstatement with backpay. Also, the Respondent will

have to postappropriate remedial notices. Because this is a construction industry case, however, where the job in question may already be completed, we will have to wait until the compliance stage of this proceeding to see whether and/or where the three men will be reinstated. *Dean General Contractors*, 285 NLRB 573 (1987).

#### CONCLUSIONS OF LAW

1. The Respondent, Cleveland Construction, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, the United Brotherhood of Carpenters and Joiners of America, Local 1207, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove its allegations at paragraphs 6(a), (b), and (c), and 7 of the complaint.

4. Pursuant to paragraphs 6(d) and (e), 8, 9, and 11 of the complaint, Respondent violated Section 8(a)(1) of the Act in terminating Dewey Bruce Murphy, Raymond DeNuzzo, and Michael George.

5. The unfair labor practices of Respondent described in paragraph 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

Accordingly, IT IS ORDERED that Cleveland Construction, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from discriminatorily terminating any employees because of their protected concerted activity and, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Dewey Bruce Murphy, Michael George, and Raymond DeNuzzo the jobs they were terminated from or, if those jobs no longer exist, jobs at substantially equivalent positions at new jobsites, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Dewey Bruce Murphy, Michael George, and Raymond DeNuzzo whole for any loss of pay and benefits they may have suffered by reason of their unlawful termination, to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

<sup>6</sup>Respondent incorrectly relies on Brooks' hearsay testimony that the OSHA inspector told him that they "passed" (Tr. 308). Thus, Respondent is wrong in contending that OSHA concluded that hearing protection was available and not required.

<sup>7</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Within 14 days from the date of this Order, remove from its files, any reference to the unlawful discharges, and within 3 days thereafter notify the former employees in writing that it has done so and that it will not use the discharges against them, in any way.

(e) Within 14 days after service by the Region, post at its facility in Charleston, West Virginia, and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 31, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

<sup>8</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees for engaging in these protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer Dewey Bruce Murphy, Michael George, and Raymond DeNuzzo full reinstatement to their former jobs or, if those former jobs no longer exist to a substantially equivalent position without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this order, remove from our files any reference to the unlawful discharges and within 3 days thereafter notify Dewey Bruce Murphy, Michael George, and Raymond DeNuzzo in writing that this has been done and that the discharges will not be used against them in any way.

CLEVELAND CONSTRUCTION, INC.